

Before the
Federal Communications Commission
Washington, D.C. 20554

TCI Cablevision of Montana, Inc.)	
d/b/a AT&T Cable Services)	
Complainant,)	
)	File No. PA 00-002
v.)	
)	
Energy Northwest, Inc.)	
Respondent.)	

ORDER

Adopted: August 16, 2000

Released: August 18, 2000

By the Deputy Chief, Cable Services Bureau:

1. On April 14, 2000, TCI Cablevision of Montana, Inc. d/b/a AT&T Cable Services ("Complainant") filed a pole attachment complaint ("Complaint") against Energy Northwest, Inc. ("Respondent") pursuant to Section 224 of the Communications Act of 1934, *as amended* ("Pole Attachment Act")¹ and Subpart J of the Commission's Rules.² On May 24, 2000,³ Respondent filed its Response, which included a request that the Complaint be dismissed because the Federal Communications Commission ("Commission") lacks jurisdiction over the Respondent. On June 13, 2000, Complainant filed its Reply.

2. Pursuant to the Pole Attachment Act, the Commission does not have jurisdiction to regulate attachments to poles owned or controlled by a utility that is cooperatively organized.⁴ The Senate Report on the Pole Attachment Act acknowledged that "pole rates charged by . . . cooperative utilities are already subject to a decision making process based upon constituent needs . . . These rates presumably reflect what . . . managers of customer-owned cooperatives regard as an equitable distribution of pole costs between utilities and cable television systems."⁵ Respondent states that, in November 1998, Flathead Electric Cooperative acquired an investor owned utility's service area that included the cities of Columbia Falls, Whitefish and Kalispell, Montana. Because, pursuant to Montana law, these areas were too

¹ 47 U.S.C. §224.

² 47 C.F.R. §§1.1401-1.1418.

³ On May 12, 2000, Respondent filed a motion for extension of time to file its response, which was granted. *See* In the Matter of TCI Cablevision of Montana, Inc. d/b/a AT&T Cable Services v. Energy Northwest, Inc., 15 FCC Rcd 8841 (2000).

⁴ 47 U.S.C. § 224 (a) (1). *See also* 47 C.F.R. § 1.1402 (a).

⁵ S. Rep. No. 95-580, 95th Cong., 1st Sess. (1977).

populated to be served directly by Flathead Electric Cooperative, Flathead Electric Cooperative created a wholly-owned subsidiary, Energy Northwest, Inc. (the Respondent), to service these areas.⁶ Respondent is incorporated as a for profit corporation under Montana law, because it is ineligible to incorporate as a rural electric cooperative due to the size of its service areas. However, Respondent's articles of incorporation⁷ and bylaws⁸ specifically require Respondent to operate on a non-profit, patronage basis for the mutual benefit of its patrons, the users of its services. Respondent's patrons are represented on the board of trustees of Flathead Electric Cooperative; its profits, if any, are allocated to its patrons; its directors are democratically elected by its patrons; and Respondent is classified as a cooperative by the Internal Revenue Service.⁹

3. Complainant argues for a narrow interpretation of the Pole Attachment Act's term "cooperatively organized" that would exclude Respondent from exemption from our pole attachment regulations. Complainant argues that Respondent's legal structure, while "cooperative like," does not satisfy the phrase "cooperatively organized" as it is used in the Pole Attachment Act. We disagree. The record shows that Respondent's classification as a for profit corporation under Montana laws creates little, if any, restriction on Respondent's ability to operate as a cooperative in providing service to its patrons. We find that Respondent is "cooperatively organized" as the term is used in the Pole Attachment Act. Therefore, we find that the Commission is without jurisdiction to resolve the Complaint and it will be dismissed.

4. Accordingly, IT IS ORDERED, pursuant to Sections 0.321, 1.1402 and 1.1406 of the Commission's Rules, 47 C.F.R. §§ 0.321, 1.1402 and 1.1406, that the referenced complaint IS DISMISSED, and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

⁶ Respondent honored a settlement agreement, entered into by Complainant and the investor owned utility that had previously served Columbia Falls, Whitefish and Kalispell, until the agreement expired in December 1999. At that point, Respondent increased the annual pole attachment rate from \$3.75 per pole to \$13.84, a rate similar to that being charged by Flathead Electric Cooperative in its service areas outside of Columbia Falls, Whitefish and Kalispell.

⁷ Response at Exhibit E.

⁸ Response at Exhibit F. Exhibit F, as filed, contained only excerpts of Respondent's bylaws. On August 15, 2000, at the request of the Cable Services Bureau staff, Respondent provided a complete copy of Exhibit F to its Response.

⁹ Response at Exhibit A.